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Conclusions: Post-communism, Neoliberalism and Populism in the Semi-Periphery***

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Abstract: The wave of revolution in the region of Central and Eastern Europe (CEE) that began in 1989 resulted in the rejection of actually existing socialism, widely perceived as oppressive, and its replacement with neoliberalism. Despite democratic rhetoric, in matters of political decision- making, neoliberalism has been decidedly undemocratic relying on "experts" implementing the "objective laws of economics." On the wave of democratisation, the neoliberal ideology supported by a relatively small percentage of society became hegemonic. Although the sense of democratisation was widespread, law-making was not based on the realisation of social preferences. On the contrary, it was legislative processes that shaped the society's axiological preferences. The neoliberal bias concerned not only economic policy and legislation, but also judicial decisions. The CEE variant of conservative-social populism can be described as a reaction to the neoliberal hegemony but it must be kept in mind that the semi-peripheral CEE region remains different from the West on various accounts. The problems here are sometimes rooted in Western concepts, (failed) legal transplants, and local reflections of Western disputes. However, even if they are imported, they take very specific forms that require both specific tests and diagnoses as well as original, region-specific solutions.

Keywords: Central and Eastern Europe, transformation, post-communism, neoliberalism, populism, semi-periphery, peripherality, legal transplants

[248] Formulating the conclusions of a volume written by many authors with different assumptions, views and style of academic writing is not an easy matter. The chapters of the book, despite the fact that they all deal with similar topics and fit into a specific plan, remain "autonomous" works of their authors. Paraphrasing them would effectively mean, if Jacques Derrida is right, rewriting them. Therefore, in our concluding remarks, we will not summarize or conclude individual chapters of the book, but will focus on highlighting the issues that turned out to be crucial for us.

In Foucault's theory of discourse, what is external and what is internal is in an irremovable clinch. Discourse produces reality, but at the same time it is determined by the

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material. Eastern Europe was clearly created by discourse.[1] As noted by Larry Wolff, this discourse was shaped by the luminaries of the Enlightenment, who recognized the west as the civilizational core and saw the periphery in the east.[2] The fact that Königsberg, where Immanuel Kant wrote his famous 'Beantwortung der Frage: Was ist Aufklärung?' being further east than Prague, Warsaw or Budapest did not matter. No one had any doubts that Kant and his works were created in the circle of Western civilization. At the same time, the discourse that created Eastern Europe was strongly entangled in the relations of politics and power on very different levels. This may be evidenced by the attitude in the west to the Hungarian anti-Habsburg uprising of Rákóczi. In Western countries, the Magyars were perceived either as noble freedom fighters or as uncouth barbarians – depending on what kind of relations the country had with Austria. What is more, ***[249]*** in France, Enlightenment thinkers approached the system of the largest state in Eastern Europe – the disintegrating Polish-Lithuanian Commonwealth – in extremely different ways. Rousseau admired this system while Voltaire deeply criticized it. In general, however, Eastern Europe appeared to the inhabitants of Western countries as wild, dark, mysterious lands inhabited by half-barbaric peoples, descended from Asian tribes. Undoubtedly, however, what is material also contributed to the formation of the specificity of Eastern Europe. Already in the late Middle Ages, the arable land owned by the peasants was rapidly shrinking east of the river Elbe.[3] In the 15th century, a manorial economy based on serfdom developed in eastern Europe,[4] a fact that Immanuel Wallerstein linked theoretically with the birth of the capitalist world-system.[5] From the point of view of the capitalist core, the region of Eastern Europe has become permanently different. When Enlightenment discourses identified the Age of Lights as the culmination of history, reactions in Eastern Europe varied. In Russia, the rulers tried to force the elite to modernize (famously cutting the beards of the boyars). In Poland, a relatively small group of nobility supported by the Warsaw bourgeoisie led, as a result of a partial coup d'état in May 1791, to the adoption of the first modern constitution in Europe, which preceded the revolutionary French constitution by several months. The history and content of the Constitution of May 3[6] well illustrate the specificity of the region. Polish radicals read French books and identified themselves as the Left, and yet they formulated views contradictory in some aspects to the postulates of French radicals – they demanded the centralization of power in the hands of the monarch. What is more, they did not formulate demands for the freedom of all people, the abolition of peasant serfdom, and they wanted to grant only limited political rights to the "third estate." On the other hand, the extremely conservative Targowica Confederation, organized against the May Constitution, presented itself as the main defender of freedom and was compared by many uninformed observers in the West to French and American revolutionaries.[7] The above example shows that

[1] Michel Foucault, *The Archaeology of Knowledge and The Discourse on Language* (New York: Pantheon Books, 1972), 38.

[2] Larry Wolff, *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment*, (Stanford: Stanford University Press, 1994)

[3] Jerzy Topolski, 'Continuity and Discontinuity in the Development of the Feudal System in Eastern Europe (Xth to XVIIth Centuries)' (1981) 10(2) *Journal of European Economic* 373.

[4] Jerzy Topolski, 'The Manorial-Serf Economy in Central and Eastern Europe in the 16th and 17th Centuries' (1974) 48 *Agricultural History* 341.

[5] Immanuel Wallerstein, *The Modern World-System. Capitalist Agriculture and the Origin of the European World Economy in the Sixteenth Century* (New York-San Francisco-London: Academic Press, 1977).

[6] See e.g. Marian Hillar, 'The Polish Constitution of May 3, 1791: Myth and Reality' (1992) 37(2) *The Polish Review* 185.

[7] Adam Sulikowski, *Postliberal Constitutionalism: The Challenge of Right Wing Populism in Central and Eastern Europe* (Abingdon: Routledge 2023), 8.

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ideological conflicts in Eastern Europe were usually mirrors of Western ones, but they took a specific form, sometimes difficult to ***[250]*** understand in the West. As Przemysław Tacik notes in Chapter 1, this is still the case today. Contemporary disputes over the rule of law and identity conflicts are part of the processes present in the West, but at the same time there remain far-reaching differences between what is going on in the centre and periphery.[8]

The differences between East and West are particularly concerned with issues of freedom. As indicated above, the conservative nobility in the region saw a threat to freedom in granting political rights to the townspeople and in abolishing the serfdom of the peasants. Moreover, modernization and the related emancipation took place in our part of the continent in the conditions of colonization "enslavement" and the subordination of local traditions to the policies of Western empires. Even more strange is that the slogan of liberation was carried on its banners by the Soviet army, which, implementing distorted Western ideas of Marxism, introduced long-term rule in the region. Not only Marxism, but also fascism was different here than in the West. This makes both the universalism of Western research categories and paradigms (also in relation to populism) and the assumption of the omnipresence of the Enlightenment a mistake, as pointed out in Chapter 2 by Cosmin Cercel. The author calls for courage in questioning popular categories and for the broadest possible consideration of local entanglements in research on a part of the continent that has been different from the west for centuries.

The wave of revolution in the region that began in 1989 resulted in the rejection of actually existing socialism in the region. This system was commonly considered as a form of enslavement, despite the fact that it brought unprecedented emancipation of the lower social classes and introduced universal access to free education and health care. However, the "liberation" from Marxism resulted in the dominance of neoliberalism, which brought real oppression to a large part of society. Neoliberalism in the context of changes in Central and Eastern Europe should be understood broadly: not only as a postulative economic ideology focused on maximum "market liberation" – i.e. minimizing the role of the state in the economy, the privatization of public tasks, favorable tax rates for corporations, welfare cuts, limiting employees' legal protection, and moving away from the concept of the welfare state.[9] Neoliberal ideology also involves the promotion of a specific mentality and ethical models – the heroes of history are entrepreneurs, active people who develop a mythical economy and contribute to global welfare by getting rich, while the anti-heroes are people who, unable to cope in a capitalist environment, "reach out to the state" and encouraging it to strengthen the processes of redistribution through political methods. In ***[251]*** matters of political decision-making, neoliberalism is decidedly undemocratic.[10] In decision-making processes related to economics, i.e. in practice in almost all political issues, the voice of an expert based on "objective laws of economics" must have priority.

The career of neoliberalism in CEE can be described as strange. On the wave of democratization, the ideology supported by a relatively small percentage of society became hegemonic. In the early 1990s, Polish sociologist and constitutionalist Piotr Winczorek was astonished to state that with the relatively strong intensity of populist tendencies in the society and in some political groups, the values inherent in populism marked their presence in the content of the law rather poorly. Moreover, despite the lack of liberal traditions in the region, the axiology preferred by the law was clearly liberal in nature. Although the sense of

[8] See Chapter 1 by Przemysław Tacik in this volume.

[9] David Harvey, *A brief history of neoliberalism* (Oxford University Press 2005), 2ff.

[10] Sulikowski, *Postliberal Constitutionalism*, 74.

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democratization was widespread, law-making was not based on the realization of social preferences. On the contrary, it was legislative processes that shape's the society's axiological preferences.[11]

The neoliberal bias concerned not only economic policy and legislation, but also judicial decisions. Moreover, the case-law sometimes went much further than legislation. More cautious researchers write in this context about judicial activism.[12] while those more radical indicate that the concept of juristocracy should be used.[13] It was not infrequently that the courts formulated their decisions based on a very controversial understanding of the law, sometimes even *contra legem*.[14] Numerous studies show that the case-law of the highest courts in the matters of social rights, usury restrictions, labour relations, and limitation of claims were much more neo-liberal than the linguistic wording of the provisions and justifications of legislative drafts.[15] As Alexandra Mercescu points out with regard to Romania, liberal excesses were fostered by the narrative moulding together of the rule of law, legal form and neo-liberal ideology, whereby formalism provided a pretext and camouflage for controversial decisions.[16] The liberal approach to the law as a neutral means of agreeing upon an objectified consensus around key ***[252]*** political issues not only made it possible to mask the ideological bias of judicial decisions, but also became the cause of a populist reaction. As Mátyás Bencze writes in his chapter, activism and mistakes in filling key positions in the judiciary made it very easy for the illiberals to take control of the state in Hungary.[17] Undoubtedly, the sense of lack of justice and real alienation of the majority of society in terms of influence on politics and economy was a factor influencing the crisis of demoliberalism in Central and Eastern Europe. Some social groups have turned hope for change towards authoritarianism. As noted by Peter Čuroš, writing in the context of Slovakia, the specificity of our region also lies in the fact that authoritarianism is capable of generating in society a much deeper illusion of participation than liberalism was able to create.[18]

Illiberal populists won successive elections promising to reduce the neoliberal bias of politics and law. According to some authors, the implementation of the populist agenda has contributed to a wider inclusion of the problems of the lower classes in mainstream political discussions.[19] The informal revolution initiated by Orbán and Kaczyński is even interpreted as the necessary completion of the systemic transformation started in 1989 – after the phase of liberalization and building the legal foundations of constitutionalism, there is democratization

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[11] Piotr Winczorek, 'Uwagi o aksjologicznych aspektach działalności legislacyjnej w dziedzinie prawa publicznego w Polsce' [Some remarks on the axiological aspects of legislative activity in the area of public law in Poland] (1994) 56(4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 53.

[12] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (New York and London: Springer Dordrecht, 2005), 62.

[13] Bela Pokol, *The Juristocratic State: Its Victory and the Possibility of Taming* (Budapest: Dialog Campus, 2017), 85.

[14] Adam Sulikowski, 'Government of Judges and Neoliberal Ideology: The Polish Case' in Mańko et al., *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Counterpress 2016), 22-23.

[15] See Chapter 3 by Adam Sulikowkski and 7 by Mátyás Bencze, in this volume.

[16] See Chapter 6 by Alexandra Mercescu, in this volume.

[17] See Chapter 7 by Mátyás Bencze in this volume.

[18] See Chapter 8 by Peter Čuroš in this volume.

[19] Adam Czarnota, 'Constitutional Correction as a Third Democratic Revolutionary Moment in Central Eastern Europe' (2019) 11(2/3) *Hague Journal on the Rule of Law* 397, 404. See also chapter 4 by Karolina Kocemba and Michał Stambulski, in this volume.

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combined with a wider inclusion of the interests of the popular masses into official politics.[20] Undoubtedly, Polish "conservative revolutionaries" refer to the narratives typical of all populism about including the people in decision-making processes and the fight against elites for more just rule.[21] Nevertheless, there is little evidence of broader social inclusion in both Hungarian and Polish policies. There has been a decisive centralization of state management. The critical reaction of *Solidarna Polska* (one of the parties forming the illiberal populist coalition in Poland) to the presidential bill on justices of the peace can be presented as an example of the anti-democratic attitude of populists after gaining power. The leaders of this party recognized that the election of judges by the citizens would only strengthen the processes of judicial anarchism and lead to the control of the judiciary by local cliques. Paradoxically, violent social reactions erupt against some populist moves. An example is the revolt described by Rafał ***[253]*** Mańko in Chapter 5 against the judgment delegalising embryopathological abortion in Poland, handed down by the Consitutional Court controlled by an illiberal majority. Violent reactions and mass protests led to the suspension of the publication of the judgment for a period of three months, which, according to the author, was an example of "*exceptio popularis*", a "minor" state of exception, conceptually related to the *stato di eccezione* theorized *inter alia* by Giorgio Agamben.[22]

An important element of the specificity of Central and Eastern Europe is the limitation of settling accounts with the past. The implementation of transitional justice was hindered primarily by the scale and long-term nature of totalitarian practices. As Vaclav Havel convincingly argued,

> We have all become used to the totalitarian system, […] and accepted it as an immutable fact, thus helping to perpetuate it. We are all – though naturally to various degrees – responsible for the creation of the totalitarian machinery. None of us is just its victim; we are all responsible for it.[23]

However, contrary to Havel's view, populist discourses were able to convince the masses that they could feel themselves victims of the system they participated in building. The imperfections of transitional justice are an important factor in the success of populists. In the populist discourses in the region, a specific combination of post-communism and liberalism took place. According to this narrative, liberalism is a dialectical complement to Marxism, sharing with it the conviction of the need to promote progress and build a "new man" – the practice of liberalism and real socialism is the same – it consists in building by privileged social groups unconditional support for the ruling ideology and accumulation of capital. Post-communism in this perspective is a mental effect of transforming the former *homo sovieticus* into the new *homo oeconomicus*. The basis of this mentality is cynicism and slyness, moral relativism and at the same time a complex and utopian belief in the possibility of freeing oneself from the "east." From an external perspective, it is also an element of self-destructive naivety – the attitude of a lemming. The process of propagating the "post-communist" mentality is, according to the illiberal narrative, controlled by local compradors, backed by international plutocrats striving for the disappearance of all authority and factors integrating colonized

[20] Paul Blokker, 'Building democracy by legal means? The contestation of human rights and constitutionalism in East-Central Europe' (2020) 18(3) *Journal of Modern European History* 335.

[21] Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge MA: Harvard University Press, 2019), 4ff.

[22] See chapter 5 by Rafał Mańko in this volume.

[23] Quoted in Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 199), 214.

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societies.[24] In other words Soviet colonization was replaced by liberal one. The same people are responsible for it – post-communists or their descendants. Traitors who should be punished continue ***[254]*** to live in comfort and corrupt the nation. As Saygun Gökarıksel points out in his chapter, the imperfections of transitional justice are the reason for legitimizing and strengthening the victims' discourse, based on the assumption of national innocence and purification of guilt. The niche created by the lack of remembrance practices has been taken over by the essentialist, exclusionary identity politics that right-wing populist groups are fueling as part of nationalist sovereignty and security policies.[25]

Interestingly, in Russia, which was the former hegemon, populist narratives are similar and different at the same time. On the one hand, the oligarchic elites that are liberal today have a Soviet communist past and therefore cannot be trusted. On the other hand, the saviours must be people with a traditional Soviet mentality, faithful to the state and focused on averting the "greatest geopolitical catastrophe," which was the collapse of the Soviet Union.[26]

What the contributions to this volume have shown, is that semi-peripheral Central and Eastern Europe remains different from the West. The problems here are sometimes rooted in Western concepts, (failed) legal transplants, and local reflections of Western disputes. However, even if they are imported, they take very specific forms that require both specific tests and diagnoses as well as original, region-specific solutions. Referring to Michel Foucault, we could point out that these differences are, above all, caused by different historical experiences. As Foucault explained, genealogy must define a historical ontology in relation to local regimes of truth, to fields of power that are unitary only in a very specific context, and to ethics that are also immersed in a specific *hic et nunc*.[27] In the opinion of Foucault himself, who spent more than a year in Poland in the late 1950s, local historical experiences were much more important for the process of understanding the context than modernizing structures, political devices or even formalized means of control and pressure. The French philosopher wrote that a special "historical sadness" prevailed in this part of the world, the conviction that history made any changes very difficult. There was no Western historiosophical optimism here.[28] In 1982, when Foucault became involved in helping the Polish opposition after the imposition of martial law, he wrote in Paris 'we are not living in the same time as them.'[29]

[255] Pierre Legrand, a philosohper of law and comparative lawyer exceptionally sensitive to the dialectic of sameness and difference pointed out that German, French or English law can never be the same precisely because of radically different contexts in which both legal systems are interpreted. Being a German, French or English lawyer is so deeply imbued in being a German, Frenchman or Englishman, that even if on the face the legal solutions coincide (as the Common Core project tried to show), the actual life of the law remains raidcally different.[30] Therefore, comparative studies must be particularly sensitive to the differences in perspectives

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[24] Andras Lanczi, 'What is Postcommunism' (2007) 29(1) *Society and Economy* 65.

[25] See chapter 9 by Saygun Gökarıksel in this volume.

[26] See chapter 10 by Mikhail Antonov in this volume.

[27] Michel Foucault, 'Afterword: The Subject and Power' in Hubert L. Dreyfus, Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1983).237.

[28] Michel Foucault, 'L'experience morale et sociale des Polonais ne peut plus etre effacee', in Michel Foucault *Dits et ecrits*, Franęois Ewald, Daniel Defert (eds.) vol. 4, Gallimard, Paris 1994, p. 345

[29] Michel Foucault , 'Il n'y a pas de neutralite possible' in *Dits et ecrits*, op cit.p.338.

[30] Pierre Legrand, 'The Impossibility of "Legal Transplants" (1997) 4 *Maastricht Journal of European and Comparative Law* 111; idem, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: CUP 2003).

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at many levels of analysis. All the more so that comparative studies should play a critical and political role. It should debunk myths instead of perpetuating them. As Legrand notes,

> At a time when the co-presence of the foreign has become a fact of life for every law and for so many lawyers, 'comparative law''s disreputation cannot but give cause for particular concern. In this sense, negativity epitomizes the transformative role that theory must play as counter-discourse. It effectuates a politics of (good) resistance. It is transgressive in as much as it is critically promoting a radical intellectual transformation or re-signification of the field of 'comparative law' operating as what Adorno's aesthetics of negativity styles a 'Nicht-Mitmachen' (a not-playing-along or a non-participation). It is an undisciplined gesture.[31]

On the other hand, as noted by Richard Rorty, the public functions of theory require the weakening of identity elements in favor of perceiving similarities. After all, left-wing philosophizing at least since Marx's famous Eleventh Thesis on Feuerbach is politics. Closing and emphasizing otherness limits the cooperative inclinations of theory, privatizing it.[32]

Practicing critical theory in the context of Central and Eastern Europe, one must be aware of both the great differences and some similarities necessary for political dialogue with the West. Even if Kaczyński and Orbán resemble, *qua* populists, Western European, US or South American populists – which, in external and formal traits, they undoubtedly do – the *episteme* in which CEE populisms are grounded is intransietly different from the UK, Venezuela or Florida. This is not only on account of different languages, but above all on account of very different historical experiences, cultural ***[256]*** legacies, and symbolic universes. The symbolic universe of a peasant from Mazovia (Poland) is incomparable to that of a Texas rancher or Venezuelan farmer. It is, however, comparable to a Slovak or Hungarian farmer. The common experience of foreign rule (be it Russian, Austrian or Ottoman), the common experience of actually existing socialism imposed from above from the USSR, the common experience of a brutal, unexpected and unplanned transition to a market economy, finally the experience of joining, not really prepared, the European Union – all these common experiences of Central and Eastern Europe create a common symbolic space, a space of common collective memories, common legal and political experiences, and common predicaments. In objective sociological and historical terms, the commonality of our region, contrasting it to Western Europe but also to other peripheral and semi-peripheral regions of the world, contributes to a common CEE identity.[33]

As critical legal scholars, we would of course be happy to welcome in our region a new CEE version of left populism of the kind described and advocated by Chantal Mouffe.[34] At the same time, however, as historically embedded legal realists, we are aware that, at this conjecture, the advent of a progressive populism in our region is not possible. As Saygun Gokariksel has shown in his chapter, the negative experiences of Soviet influence during the socialist period have been turned into an entire ideology of anti-communism, effectively

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[31] Pierre Legrand, 'Negative Comparative Law' (2015) 10 *Journal of Comparative Law* 450.

[32] Richard Rorty, 'Philosophy as Cultural Politics' in *Political Papers* (Cambridge: CUP, 2017), 90.

[33] Rafał Mańko, Martin Škop and Markéta Štěpáníková, 'Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?' (2016) 6(2) Wroclaw Review of Law, Administration and Economics 4; Rafał Mańko, 'Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography' (2019) *Acta Universitatis Lodziensis. Folia Iuridica* 63; idem, 'Being Central European, or Some Reflections on Law, Double Peripherality and the Political in Times of Transformation' in Tomás Gábriš and Ján Sombati, *Central and Eastern Europe as a Double Periphery* (Berlin: Peter Lang, 2020).

[34] Chantal Mouffe, *For a Left Populism* (London: Verso, 2018).

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blocking progressive political projects on account of their Marxist pedigree. At the same time, however, as Karolina Kocemba and Michał Stambulski have convincigly argued, the government of Law and Justice is selectively picking the pecuniary elements of a lefitst programme (social transfers) in order to build an electorate within the working class and the *lumpenproletariat*, thereby effecitvely annihilating any potential social base for the emegence of a leftist populism.[35] *Mutatis mutandis*, the same diagnosis applies for Hungary.

In these circumstances, as critical legal scholars we need to be political realists and count with a possible *longue durée* of populist rule in our region. It is within the horizon of this specific historical conjecture that the outline of our critical approach should be formulated. After all, as scholars, in contrast to activists, we intend to partake in the moulding of social consciousness ***[257]*** and act as members of ideological intelligentsias, struggling for hegemony. Undoubtedly, the present moment is marked, to an increasing extent, by the hegemony of the illiberal, right-wing, ethnonationalist and conservative-clerical ideology. As numerous chapters in the book have shown, this ideology increasingly enjoys the upper hand in the shaping of the material content of the law.[36]

Despite a number of affinities with Western Europe, on one hand, and with non-European states troubled by the phenomenon of populism, on the other hand, the CEE region displays a number of particular traits. In the introduction to this volume, they were identified as the region's semi-peripheral status (as opposed to full peripherality), on one hand, and its historical experiences marked by the short traditions, frequent transitions, and deep traumas. Without repeating the claims made in the introduction, in the present concluding remarks we would like to draw concrete methodological conclusions from this semi-peripheral status of Cenral and Eastern Europe, made in hindsight of the onslaught and entrenchment of illiberal populism.

On top of the classical methodological commitments made in the 'Introduction' (emancipation, realism, anti-formalism), drawing on the chapters in this volume, we believe that two other concrete recommendations can be formulaed. Firstly, the critique of legal transplants. As it was noted in the introductory chapter, and became visible in the case studies in chapers 3-10, legal transfers have, indeed, determined the form and outlook of legal life of CEE. This is not to say that legal transplation is *per se* wrong – after all, Alan Watson praised it for being the prime *spiritus movens* of juridical innovation.[37] What is problematic, however, from a CEE perspective, is that the legal life of the region became, especially as regards constitutional law, virtually colonized by legal transfers. The case-law of the Polish, Hungarian or Romanian constitutional courts in the neoliberal 1990s and early 2000s all sounded almost the same, as if a symphony of juridified neoliberalism. As many chapters in this volume have shown, these neophitic courts were virtually deaf to any calls for defending social rights, even if the letter of the constitution lended itself easily to such an interpretation (for example, the Polish constitution mentions "social justice" in its Article 2).[38]

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[35] Chapter 4 by Karolina Kocemba and Michał Stambulski in this volume.

[36] See especially chapters by Karolina Kocemba and Michał Stambulski; Rafał Mańko; Matyas Bencze and Saygun Gokariksel, in this volume.

[37] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd ed., Atlanta: University of Georgia Press, 1993).

[38] See especially chapters by Adam Sulikowski and Alexandra Mercescu, in this volume. By contrast, see also chapter by Karolina Kocemba and Michał Stambulski, emphasising the social rights focus of the populists.

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[258] Therefore, any reasonable critique of the legal status quo of Central and Eastern Euorpe cannot shun away from a critique of legal transplants.[39] Whereas American, British or French constitutionalists can, probably, do without such a concept, in order meaninfully to study the legal life of the semi-periphery one needs the critical tools oferred by theories of peripherality and neocolonialism. Despite all the formal affinities, to criticize a judgment of the Polish, Romanian or Hungarian Constitutional Court *is essentially different* from subjecting to critique the judmgent of the Bundesverfassungsgericht, the Corte Costituzionale or the Conseil Constitutionnel. Even if *in form* they are the same, the courts of CEE are working with legal transplants which radically changes the entire sense of their enterprise.[40]

Legal transplants are very closely connected to legal survivals, i.e. legal institutions which have survived despite a radical change in the political, social and economic milieu.[41] As it was noted in section 4 of the 'Introduction', Central and Eastern Europe have been marked by sharp and traumatic transitions,[42] allowing for little institutional continuity. This thesis can be fairly applied to the entire region, including the enitrety of the former USSR, whose statehood represented a deep, programmatic and pragmatic discontinuity with that of the Russian Empire.

In this general context of institutional discontinuity, there still emerge, from time to time, legal institutions clearly originating in the past.[43] These institutions can be compared to palimpsests.[44] The external layer of the law, its visible form, hides beneath itself earlier epochs (e.g. authoritarian ***[259]*** traditions of actually existing socialism or right-wing authoritarianism of the 1930s) and, at the same time, foreign origins of legal transfers. To understand such legal institutions and subject them to a critique, it is necessary to go beyond external appearances, looking for hidden continuities, forgotten foreign origins of "tamed" and "translated" legal transplants, and undisclosed ideological commitments made under the cover of officially recognised hegemonies. Whereas all these features are present in legal cultures of the centre, they obtain a different significance in the semi-periphery, where the discrepancy between the actual lived *nomos* and the formal law has been always greater, the domination of legal

[39] Cf. Hans-Wolfgang Micklitz, 'Prologue: The Westernisation of the East and the Easternisation of the West' in Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Oxford: Hart, 2015); Michał Gałędek, 'Introduction: Modernisation, National Identity, and Legal Instrumentalism' in Michał Gałędek and Anna Klimaszewska (eds), *Modernization, National Identity and Legal Instrumentalism: Studies in Comparative Legal History*, vol. 1: *Private Law* (Leiden-Boston: Brill-Nijhoff, 2020).

[40] Cf. Chapter 8 by Alexandra Mercescu in this volume.

[41] Rafał Mańko, 'Survival of the Socialist Legal Tradition? A Polish Perspective' (2013) 4(2) *Comparative Law Review* 1; idem, '"Demons of the Past"? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law' in Mańko, Cercel and Sulikowski (eds), *Law and Critique*, 66-89; idem, 'Legal Survivals and the Resilience of Juridical Form,' *Law and Critique* (forthcoming).

[42] Rafał Mańko, 'Law, Politics and the Economy in Poland's Post-Socialist Transformation: Preliminary Notes Towards an Investigation' in Balazs Fekete and Fruzsina Gárdos-Orosz (eds), *25 Years After Transition in Central and Eastern Europe: Understanding the Transition from an Internal Perspective* (Frankfurt am Main: Peter Lang, 2017).

[43] Rafał Mańko, 'Towards a Typology of Dimensions of the Continuity and Discontinuity of Law: The Perspective of Polish Private Law after the 1989 Transformation' (2016) 6(2) *Wroclaw Review of Law, Administration and Economics* 108; idem, 'Form and Substance of Legal Continuity' (2017) 17(2) *Zeszyty Prawnicze* 207.

[44] For an application of the metaphor of a palympsest to the law, albeit in a different setting, see e.g. Bret D Asbury, 'Law as Palimpsest: Conceptualizing Contingency in Judicial Opinions' (2009) 61 *Alabama Law Review* 121.

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transplantation over local legal innovation absolute, and legal continuity was rather the exception than the rule.[45]

[45] Cf. introduction to this volume.

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